

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEWIS CATO,)	
)	
Plaintiff,)	No. 08 C 45
)	
v.)	
)	
UNITED STATES OF AMERICA,)	Judge Guzman
)	
Defendant.)	

UNITED STATES' MOTION TO DISMISS

The United States of America, by Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, moves to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for plaintiff's failure to exhaust his administrative remedies as required by the Federal Tort Claims Act ("FTCA"), and in support states:

1. On September 14, 2007, plaintiff Lewis Cato filed in the Circuit Court of Cook County, Illinois, a complaint for breach of contract. Cmpl. § 1. The named defendant was Perry Painter, an employee of the United States Postal Service, acting within the scope of his employment. *See* Certification of Thomas P. Walsh, Chief, Civil Division, Office of the United States Attorney for the Northern District of Illinois, attached to the government's notice of removal.

2. Mr. Cato complained that the Postal Service employees¹ negligently misplaced or failed to deliver his personal property valued at \$3,600. Cmpl. ("Amount Claimed.")

¹ Plaintiff's complaint names Postal Service employee Perry Painter as the defendant. Under the FTCA, the only proper defendant is the United States of America. *See* 28 U.S.C. §§ 2674 and 2679.

3. On January 3, 2008, the United States filed a Notice of Removal pursuant to 28 U.S.C. § 2679 to remove Mr. Cato's complaint to federal district court because the district courts of the United States have original jurisdiction over personal and property damage claims brought against the United States and its agencies. 28 U.S.C. § 1346(b)(1).

4. While the United States and its agencies are generally immune from suit, the FTCA prescribes a limited waiver of sovereign immunity in tort actions and is the exclusive jurisdictional basis for a tort claim against the United States, its officers, agencies or employees. 28 U.S.C. §§ 1346(b), 2671 - 2680; *Duffy v. United States*, 966 F.2d 307, 313 (7th Cir. 1992).

5. One of the jurisdictional requirements of the FTCA is that no tort suit can be initiated against the United States until the plaintiff has presented a claim to the appropriate federal agency and that agency has denied the claim or has failed to issue a final decision within six months of the date the claim was presented. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2(b)(1); *McNeil v. United States*, 508 U.S. 106 (1993); *Kanar v. United States*, 118 F.3d 527, 528 (7th Cir. 1997).

6. The United States Postal Service has not received an administrative claim from Mr. Cato in this case. Ex. 1. Moreover, the complaint does not allege that Mr. Cato has exhausted his available administrative remedies required by the FTCA. *See Fishburn v. Brown*, 125 F.3d 979, 982 (6th Cir. 1997). Therefore, the jurisdictional prerequisite for filing an action against the United States for property damage has not been satisfied and Mr. Cato's complaint should be dismissed.

WHEREFORE, for the foregoing reasons, the United States requests that the court dismiss the complaint against the United States and Postal Service employee Perry Painter because Mr. Cato's failed to present his claim to the United States Postal Service.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that in accordance with FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing (ECF), the following documents:

UNITED STATES' MOTION TO DISMISS

were served pursuant to the district court's ECF system as to ECF filers, if any, and were sent by first-class mail on March 5, 2008, to the following non-ECF filers:

Lewis Cato
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